BHAGAT SINGH SURIAN SINGH

v.

M.K. RETNAM HOLDINGS SDN. BHD.

HIGH COURT MALAYA, IPOH
ABDUL RAZAK J
[CIVIL SUIT NO. 21 OF 1983]
4 APRIL 1984

CONTRACT: *Purchase of house to be built - Delay in completion - Agreement to extend time - Effect - Default by third party - Effect - Acquiescence - Waiver - Remedies - Specific performance - Indemnity.*

The plaintiff purchased a house from the defendant, a housing developer. The house was to be completed within 18 months of the signing of the agreement, failing which the defendant was to indemnify the plaintiff for late delivery. The house was not completed. A supplementary agreement was entered into, by which the purchase price was increased and time for completion was extended a further six months. As the house was still not completed, the plaintiff brought an action for specific performance of the agreement and for damages.

Held:

[1] The supplementary agreement was void and of no effect. The increase in price was in violation of Clause 30 of the original contract. Further Clause 10 of the principal contract, exempting the defendant from liability in certain circumstances, was inconsistent with r. 12(2) of the Housing Developers (Control and Licensing) Rules 1970.

[2] The failure of Keng Soon Finance to finance the defendant did not exonerate the defendant from liability to the plaintiff.

[3] The plaintiff's intervention in the claim by Keng Soon against the defendant did not constitute acquiescence or waiver.

[4] The plaintiff was entitled to specific performance of the contract.

[5] The plaintiff was also entitled to indemnity at the rate of 12% per annum of the purchase price calculated from day to day, commencing immediately after the due date of delivery of vacant possession.

[6] The plaintiff was, however, not entitled to be indemnified the rent he had to pay because of the delay. Payment of indemnity under r. 12 in intending to be comprehensive.

[Judgment to plaintiff. Defendant's counterclaim dismissed.]

Case referred to:

S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo [1982] 2 MLJ 31; [1982] CLJ (Rep) 305

Legislation referred to:

Housing Developers (Control and Licensing) Rules 1970, r. 12(2)

For the plaintiff - Hira Singh; M/s. Asbir, Hira Singh & Co.
For the defendant - S.A. Lingam; M/s. S.A. Lingam & Co.

JUDGMENT

Abdul Razak J:

The plaintiff purchased a house from the defendant, a housing developer, for RM23,900 at Taman Muhibbah housing scheme, Ipoh. It was a term of the agreement that the house was to be completed within 18 months of the signing of the agreement on 3 November 1978, failing which the defendant was to indemnify him for the late delivery. The house should have been completed in other words on 3 May 1980. However, a supplementary agreement was entered into on 11 July 1981 by which the purchase price was increased to RM27,485 and the house was to be completed within six months of the date thereof, i.e. by 10 January 1982. The house was still, however, not completed although time was of the essence. The plaintiff consequently brought the present action for specific performance of the agreement and damages, on the ground that there has been a breach for failure to complete. The defendant denied the charge. They said there had been a delay in completion, which was due to several factors beyond their control, i.e. (a) delay in obtaining the approval of the housing plans: (b) delay caused by the contractor and other contractors and sub-contractors in the performance of their contract; (c) delay in getting a suitable contractor; (d) delay caused by their financier Keng Soon Finance in refusing to release the loan for the project; (e) delay caused by the action of the contractors and sub-contractors through strike, combination of workmen, lockout and civil commotion. They pleaded frustration, acquiescence and laches. They contended that the indemnity for the delay, if any, calculated under Clause 11 of the agreement is from the date of delivery of vacant possession and not from the **due** date of delivery. They said that the plaintiff had committed a breach of contract by failing, neglecting and/or refusing to pay to them the sum of RM6,277due and payable by him under the contract. It was therefore under Clause 24 terminated. They refuted all the other claims and said that the plaintiff had not mitigated his loss. They counterclaimed (when trial was about to begin) for certain losses arising from the plaintiff's alleged breach.

A summons-in-chambers had earlier been taken out by the plaintiff to strike out the defendant's defence, but it was withdrawn on the understanding that an early trial would be fixed.

As stated, the time for the completion of the house was not complied with under the first agreement due on 3 May 1979. Indeed, the second agreement made on 11 July 1981 was essentially to extend the time, which fact was confirmed in evidence by the defendant themselves. But in the process, the defendant had also been disposed to increase the price, which clearly was in violation of Clause 30 of the agreement, since it required the prior certificate of the architect, but no such certificate was ever produced or referred to in that agreement or even adduced in this Court, which thus renders the second agreement void. The house had never been completed because vacant possession had never been delivered. Indeed, this fact seems to have been accepted because Counsel was content to argue that there has been no delay in completion. But if the second agreement was void and of no effect, then the efficacy and naturally the enforcement of the first agreement was revived. The defendant cited Clause 10 of the principal contract as justifying the delay in completion. The clause read:

> The said building shall be completed and ready for occupation by the Purchaser within eighteen (18) calendar months from the date hereof provided that the Vendor shall not be liable to any delay occasioned by strike or combination of workmen, lockout, civil commotion, force majeure, exceptionally inclement weather, loss or damage by fire, flood or tempest or other like cause outside the Vendor's control.

The defendant's own architect DW3, who was responsible for the works, seems to say however work had stopped because the contractor had not been paid and not for the reasons given by the defendant. One gathers this because the architect said that normally if the developer had paid the contractor, he would send a confirmation letter from the contractor to the architect. But there was no such confirmation. The defendant said that they had paid the contractor, but they had not produced any receipt or document in the form of acknowledgment in support. In fact, it is very strange indeed that if they had, that they seemed to be at odds with the contractor whom they said they had dismissed and sued and work had stopped. The architect had categorically denied that any of the circumstances stated in clause 10 had arisen which called for an extension of time. In any event, Clause 10 is clearly inconsistent with r. 12(2) of the Housing Developers (Control and Licensing) Rules 1970 which says:

> Notwithstanding the provisions of para. (1) of this Rule, where the Controller is satisfied that owing to special circumstances the compliance with any provisions of this Rule is impracticable or unnecessary he may by a certificate in writing waive or modify such provisions in respect of any contract of sale.

In *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] CLJ (Rep) 305, (referred to as "Sea Park"), Suffian LP said such contracting out was void. Clause 10 of the contract before me is basically similar to Clause 32 in the *Sea Park's* case, because there as well as here, it was provided that the vendor shall not liable for delay due to causes outside his control. In fact, the *Sea Park* contract was even stronger in terms because it provided that the vendor shall not be liable for **any** circumstances beyond his control. Nevertheless, the developer was held liable for non-compliance for alleged shortage of building materials and contractors and sub-contractors. The defendant before me could have applied to extend the time for completion under r. 12(2) to the Controller, but no such application was ever made, not till after the writ was filed on 28 March 1983. By that time, the second contract had lapsed on 10 January 1982, more than a year earlier. One cannot conceivably imagine in any case, even if an application for an extension of time had been made, how it could ever have been approved at all because it was clear that at all relevant times the defendant had no licence to act as a developer which was a criminal offence under the Act.

The defendant said one of the causes of delay was because of the failure of Keng Soon Finance to finance them and, the Federal Court had confirmed that Keng Soon was at fault. Keng Soon had brought an action against the plaintiff for forfeiture of their lands charged to Keng Soon which included the land on which the plaintiff's house stood, because of the alleged failure of the plaintiff to pay the interest on the loan. Final decision on this matter is, however, still pending further appeal. But I do not see how the defendant's financial problem with Keng Soon is relevant as far as the plaintiff's claim is concerned because, even if Keng Soon is found later to be at fault in not issuing the defendant's loan, it does not exonerate the defendant because under the *Sea Park* authority, such a situation can never be an excuse and the only way the defendant can meet the claim for the delay in non-completion is by applying to the Controller under r. 12 for a waiver of the rules which up to the time of the filing of this suit they had not done. If Keng Soon was to be blamed, then necessary step can be taken by the defendant, indeed should have been taken by them, to make Keng Soon a party for indemnity against the plaintiff's claim, which they have not done. If Keng Soon should succeed and the land is foreclosed at the appeal, then it would only make the defendant's case worse, because the plaintiff could go against them under Clause 4 for breach of contract for failure to deliver the land free from any encumbrances. In the same manner, the defendant's attribution of the cause of the delay to the contractors, if at all, can never

be a defence to the plaintiff's claim. The defendant, of course, can claim indemnity and contribution from the contractors, but that is a separate matter altogether. It does not alter the fact that the defendant is still liable to the plaintiff. It was said further that the plaintiff had acquiesced to or waived his right because he had intervened in the claim by Keng Soon against the defendant; but clearly this was done to protect his interest as such because the land on which his house stood was also subject to a charge by the defendant to Keng Soon and the latter was about to foreclose it. It seems to me thus there has been a breach of Clause 11 of the contract by the defendant for failure to complete in time.

It is left, therefore, for me to consider the question of damages and the remedies sought. The defendant says that the plaintiff is not entitled to specific performance because he had not paid the total amount of the purchase price. The amount payable was RM32,989.50, but the plaintiff had so far paid only RM18,454.50, leaving a balance of RM14,535. But payment must be based on the work actually done. According to the architect, only 60% of the work had been done for which certificate had been issued. In fact, the principal amount was roughly RM29,404.50 because the RM32,989.50 included the sum of RM3,585,00 being the increase in the price under the second agreement, which had not materialised. Working out the figures, 60% of RM29,404.50 was RM17,642.70, but out of this the plaintiff had paid RM18,454 which was RM800 or so more. In fact, it was surprising why the defendant had taken up this point at all, because they had said in their evidence "He (plaintiff) does not owe me any more now. All that I have demanded of him he has paid."

In my view, specific performance should lie against the defendant. The defendant said it could not be levied against them since if the appeal by Keng Soon Finance succeeded, then the land would be foreclosed. But I do not see how that should affect the defendant's obligation to the plaintiff to complete the house. If Keng Soon should decide to foreclose the land later, that seems to me to be a matter strictly between Keng Soon and the plaintiff. It has ceased to be the concern of the defendant. In any event, even if Keng Soon Finance should succeed, they could not be expected to foreclose the land without taking into account the interest of the plaintiff, since Keng Soon Finance was fully aware of the right of the latter against the defendant because they had called for and had notice of the agreement (first agreement) before they even decided to issue the loan, as can be seen from the judgment of the Federal Court. It seems to me that under the circumstances equity demands that their right must be subject to the prior right of the plaintiff. Where the equities are equal, the first in time must prevail.

The plaintiff is entitled to indemnity because of the delay in completion at the rate of not less than 8% per annum of the purchase price calculated from day to day commencing immediately after the due date of delivery of vacant possession, as provided under Clause 11 of the contract, and r. 12(1) and (2) of the Housing Rules. The plaintiff said that there had been a delay of 1,378 days and asked for interest at 14% per annum. In my view, the rate at 12% per annum was not unreasonable considering that under the authority of the *Sea Park* case (referred to later), it is an all-embracing indemnity. The necessary criterion must be how much would the purchaser gain if he had let the house in the open market bearing in mind that he had to rent a house, while waiting for his house to be completed. According to PW2, the owner of the rented house, the rent charged was RM230 per month as shown by the receipt. At 12% per annum of the purchase price, it was RM294 per month which was roughly the rent accruable for a new house at the relevant time. I have also to take into account the inconvenience the plaintiff had to put up with staying in a rented house. The 1,378 days are worked out, as I see it, from the day the house was **due** to be completed until the filing of the plaintiff's Counsel's submission. Any other date suggested

by the defendant would be contrary to Clause 11, which specifies it from the date of delivery of vacant possession **as specified in this agreement** (The emphasis is mine). The time given in the agreement under Clause 10 is 18 months from 3 November 1978, which falls on 3 May 1980. So time begins to run from that date. But the house is still not completed; the period of indemnity naturally must continue to run until it is completed.

The plaintiff also asked for the rent which he had to pay because he could not get the house in time. But this item of damages cannot be allowed following the principle laid down by the *Sea Park* case that payment of indemnity under r. 12 is intended to be comprehensive and precludes the purchaser from recovering under any other head of damages in the event of delay in delivery. Thus, as urged, the question of knowledge by the defendant of the strong likelihood of the plaintiff having to incur this expense contrary to Counsel's for the plaintiffs, suggestion is irrelevant.

I shall now deal with the defendant's counterclaim. He claimed that the plaintiff failed to pay him RM6,277 and said that the contract was thereby annulled. This claim seems to have been abandoned because there was no mention made of it by Counsel in his submission. In any event, it is difficult to understand how it is said the plaintiff had not paid the amount when it is pleaded by the defendant that interest is due for its **late** payment. Even then, there is really no case for late payment as will be seen later. Under item (2), the defendant said the plaintiff owed him RM14,535 as balance of the purchase price, but this was inexplicable because in his evidence the defendant said the plaintiff had paid him RM18,454.50 and he had not made any demand for any other sum because the house was not completed. Indeed, as stated earlier, the defendant said that the plaintiff did not owe him any money because all that he demanded of the plaintiff had been paid. The breakdown of the RM18,454.50 shows the defendant claimed RM4,504.50 for the excess land and RM1,000 for the corner lot, but I do not see how he can claim for them when he had also claimed interest for their late payment. Obviously, these items had already been paid. There was also a claim for RM3,585 for the increase in price of the house, but it was clearly stated in the supplementary agreement that this was payable only on the house being completed. The house was never completed and the second contract was never fulfilled.

The defendant also claimed interest for alleged late payments. But first it is admitted by him in evidence that he had never asked for interest and he admitted he was not entitled to any money unless he had demanded it. The items of interest claimed, in any case, are not sustainable. The claim for interest for late payment for the corner lot at RM1,000 and for RM4,504.50 for the excess lot, which was admitted by the defendant in evidence, did not come under the second schedule of the agreement showing the items of interest which could be claimed. The interest on progress payment of RM6,277 for late payment under stage (d) of the second schedule cannot also be allowed because the defendant had admitted that he never claimed for this interest and conceded that since he had not, he was not entitled to them.

The defendant had, in my view, failed to establish his counterclaim. I would, in the circumstances, enter judgment for the plaintiff as prayed and dismiss the defendant's counterclaim with costs.

Also found at [1984] 2 CLJ 100